JAMES H. McKENNEY,
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No. 296.

Brief of Mosby for Appellee.

In the Supreme Court of the United States.

Filed Oct. 15, 1897.

THE UNITED STATES, Appellant,
vs.
WILSON, Administrator of VAN BUREN, Appellee.

No. ~~[illegible]~~ 296

Brief for Appellee.

STATEMENT.

The Court of Claims rendered judgment *nunc pro tunc*, as of June 15, 1896, in favor of appellee on account of fees for consular certificates to invoices of goods shipped from Japan *in transit* through the United States, which were paid into the Treasury. The Court finds that the fees were, in good faith, collected by the Consul; that the number of transit invoices certified by him was 1646, for which a fee of $2.50 was charged, this being the statutory fee for certifying an official invoice for goods imported, for consumption, into the United States. The goods described in 478 invoices passed through the United States; those described in 523 of said invoices were stopped in transit and entered for consumption in the United States; those in 645 invoices are not shown to have passed either into, or through, the United States.

ARGUMENT.

I.

The judgment was rendered in conformity with *United States* v. *Mosby*, 133 U. S., p. 285, affirmed in *United States* v. *Greathouse*, 166 U. S., p. 601. Greathouse was Van Buren's successor in office. Van Buren was Consul-General in Japan when Mosby was Consul at Hong-Kong, and, of course, they were both governed by the same law and regulations.

In Mosby's case no inquiry was made as to what the shipper did with the goods after the invoices were certified, because it was considered immaterial. A Consul has no control over the goods

described in an invoice. The finding that the service was performed in good faith is repugnant to the suggestion of collusion between the shipper and the Consul; the fee charged being the same as the statutory fee for an official invoice, the shipper got no benefit from its being unofficial; nor could any fraud have been meditated, as it was turned into the Treasury. It is not true, as stated in appellant's brief, that when these services were performed, the regulations declared that they were official. In this case the rights of the Consul are determined by the law as construed in the cases of Mosby and Greathouse, *supra*. In Mosby's case the Court said:— "These [transit invoices] were not the invoices referred to in Secs. 2853 and 2855 of the Revised Statutes, either as they originally stood, or as they were amended by the Act of June 10, 1880. *The law did not require the Consul to issue these certificates;* no provision was made for a fee for them in the regulations of 1874, or in those of 1881; *and it does not appear that the regulations of the Treasury Department required a Consul to perform any duty in relation to such goods.*" The regulations of 1874 and of 1881 were those in force while Van Buren was in Japan.

II.

If a shipper had used the same *form* for an unofficial invoice as that prescribed for an official copy, it would not have affected the substance of the transaction. Its official or unofficial character would have depended upon the essential question whether the shipper declared the goods to be destined for consumption in the United States, or simply to be in transit through the United States. As to goods in transit the Court said in Mosby's case: "The law did not require the Consul to issue these certificates." The finding, however, is, that the same forms were *not* used, but " the words ' in transit ' were added, following which come the name of some foreign country which was to be reached by crossing the United States." The invoice on its face, therefore, gave notice to the Collector of its unofficial character and the original destination of the goods. This made collusion between shipper and Consul impossible, if the Collector did his duty. Section 2857, Revised Statutes, authorizes a Collector to require a consignee to give bond to produce an official invoice before the goods are delivered to him. The consignee could notify the shipper to furnish the Collector an official invoice, and thus discharge the bond. This would save the fee to the Treasury, while the Consul would retain his; he cannot be deprived of it by the delinquency of a Collector. It is easy for the Treasury

Department to instruct Collectors, in such cases, to require a bond to produce an official invoice. That would prevent fraud and collusion between shippers and Consuls. It has no right to require a Consul to show that the goods have actually passed through the United States to their final destination.

III.

The stoppage *in transitu* and delivery of the goods to a consignee in the United States can have no retrospective operation on the rights of a Consul for compensation for unofficial services. If unofficial when performed, they could not become official by an *ex post facto* change of destination. He had a vested interest in the fee, not a contingent right dependent upon the caprice of the shipper. If the fee was unofficial when the service was rendered, nothing the shipper could do afterward could alter its character. The instant it was rendered, the fee belonged to the Consul, and it was not in the power of a shipper, by changing his mind, to take it away. The right was immutably fixed by the conditions existing when the act was done. The Consul had no control over the shipment of the merchandize. The change in the destination of the goods could not change the rights of the Consul, and divest him of what he had earned. As to 645 invoices, it is not shown either that the goods passed in transit through, or into, the United States. As this Court decided in Mosby's case that the fees for transit invoices were the personal perquisites of a Consul because "no law or regulation required a Consul to perform any duty in regard to such goods;" *a fortiori* he was not required to perform any duty in regard to goods that never entered the territory of the United States; consequently, the service was unofficial, and the fee personal. So far as the Consul's rights are concerned, it is immaterial what became of the goods after the invoice was certified. They may have been destroyed.

V.

The doctrine that money paid under mistake of law cannot be recovered applies only to cases when parties stand "on equal terms," *Swift Co.* v. *United States*, 111 U. S. A subordinate officer and the department to which he is subject are not on equal terms. Undue influence is presumed when he surrenders his legal rights from the relation of dominion on one side and submission on the other. If parties are on equal terms, no protest will save a right voluntarily

relinquished; if on unequal terms, no protest is necessary, except in cases where a protest is required by statute; as in the payment of duties as a condition of the right to recover them back. In the cases of *United States* v. *Lawson* and *United States* v. *Ellsworth*, 101 U. S. 169-173, the fees were paid into the Treasury *without claim or protest.* The Court said: " * * * Call it mistake of law, or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

It is respectfully submitted that the judgment below be affirmed.

JNO. S. MOSBY,
For Appellee.